

Case number: NST-E23-173421

Case Title: Heath Thorpe v Gymnastics Australia

Determination

National Sports Tribunal General Division

sitting in the following composition:

Panel Member

Ms Eugénie Buckley

in the arbitration between

Heath Thorpe

(Applicant)

Represented by Alexandria Anthony, legal representative

And

Gymnastics Australia

(Respondent)

Represented by Alexandra Ash, CEO

And

Tyson Bull

Mitch Morgans

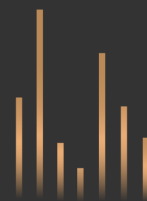
Verdant Sawant

Clay Mason Stephens

James Hardy

Jesse Moore

(Interested Parties)



PARTIES

1. Applicant is Heath Thorpe, athlete, represented by Alexandria Anthony of SportsLawyer, legal representative.
2. Respondent is Gymnastics Australia, National Sporting Organisation, represented by Alexandra Ash, CEO.

INTRODUCTION

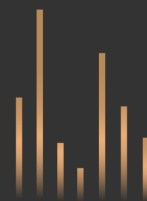
3. The Applicant is an athlete competing in Men's Artistic Gymnastics (**MAG**).
4. This matter was an appeal against Gymnastics Australia (**GA**) non-selection of the Applicant in the five member MAG team for the FIG World Championships 2023 30 September to 8 October 2023, Antwerp Belgium (**World Championships**).
5. Selection for the Championships is based on GA Selection Policy Part A, GA Selection Policy Part B (MAG Senior 2023) and the Selection Appeals Policy (**Selection Policies**).
6. The main issues were whether GA properly applied the GA Selection Policy Part B with respect to the Applicant and whether the Applicant was afforded a reasonable opportunity by GA to satisfy GA Selection Policy Part B.

NST JURISDICTION

7. The jurisdiction of the NST is engaged by section 23 of the *National Sports Tribunal Act 2019* (**NST Act**) and the GA Selection Policies.
8. The Applicant appealed his non-selection to the World Championships to the NST under Clause 5.2 of the GA Selection Appeals Policy.
9. In accordance with the procedure in the Selection Appeals Policy, an Interested Party receives notice of the Selection Appeal and is to be given the opportunity to make submissions. There were six Interested Parties in this matter being the five Selected Athletes and reserve athlete (Tyson Bull, Mitch Morgans, Verdant Sawant, Clay Mason Stephens, James Hardy and reserve, Jesse Moore).
10. In accordance with Clause 5.2(f) of the Selection Appeals Policy, all the parties to the appeal agreed that the NST would determine this appeal without a hearing. The NST agreed and considered this appropriate largely due to the urgency of the matter and the additional procedural issues associated with six Interested Parties and the fact relevant parties were across four different time zones.

FACTUAL BACKGROUND

11. The Respondent is the national governing body for Gymnastics in Australia, including the MAG discipline. The Applicant is a member of the Respondent.
12. The Applicant is an Individual All-Around (**IAA**) athlete meaning he competes in all of the six apparatus of Floor, Pommel, Rings, Vault, Parallel Bars and Horizontal Bar.
13. The dispute between the parties relates to GA's non-selection of the Applicant to compete in the upcoming World Championships.



14. This matter was urgent with a requested determination by 16 July 2023 because the World Championship MAG team was hosting its first training camp at the AIS on the following day.
15. While the Tribunal has considered all the facts, allegations, legal arguments and evidence submitted by the parties, this Determination refers only to the submissions and evidence considered necessary to explain reasoning.

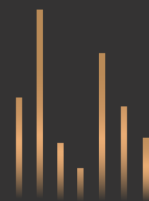
PROCEEDINGS BEFORE THE NST

16. The Applicant lodged his Application with the NST Registry on 1 July 2023 and filed further submissions and evidence by 11:59 pm 5 July 2023.
17. GA filed submissions with the NST Registry by 11:59 pm AEST 7 July 2023.
18. The Interested Parties filed submissions with the NST Registry by 11:59 pm AEST 9 July 2023.
19. The Applicant filed submissions in reply to GA and the Interested Parties with the NST Registry by 11:59 pm AEST 10 July 2023.
20. On 11 July 2023 the NST and all parties agreed that the matter would be determined without a hearing ie on the papers.
21. The NST is to provide its decision as soon as possible and before 16 July 2023.
22. No objection was made at any point to the proposed arbitrator or that procedural rights had not been fully respected.

APPLICABLE RULES

23. The arbitration was governed by the NST Act and conducted in accordance with the GA Selection Appeals Policy.
24. As above, the Selection Policies are comprised of Selection Policy Part A (general principles and common criteria), Selection Policy Part B (event specific selection criteria) and the standalone Selection Appeals Policy.
25. Clause 5.2(b) of the GA Selection Appeals Policy provides the grounds on which a Non-Selected Athlete may bring a Selection Appeal to the NST for hearing, noting the Non-Selected Athlete bears the onus of proof.
26. The Applicant relied on two of those specified grounds of appeal, as follows:
 - a. The Selection Policy Part B was not properly applied by GA with respect to the Applicant; and
 - b. The Applicant was not afforded a reasonable opportunity by GA to satisfy the Selection Policy Part B.
27. For completeness, the Applicant did not appeal using the other two specified grounds of appeal, namely:
 - a. GA was affected by actual bias in making its decision to not select the Applicant; and
 - b. There was no material on which GA's decision could be reasonably based.
28. Clause 9.2 of the Selection Policy Part B was the most relevant to this appeal and it states:

9.2 When determining Athletes to be nominated, the Selection Panel may consider the following:



9.2.1 *an Athlete's ability to contribute towards performance targets outlined in Appendix Two.*

9.2.2 *performance at Events listed in Appendix One. These Events will be weighted at the discretion of the Selection Panel. In the weighting of Events, the Selection Panel will consider several factors including but not limited to, recency of Events and level of competition.*

9.2.3 *Individual Learning and Performance Plans of Athletes under consideration.*

9.2.4 *In exceptional circumstances, the Selection Panel reserves the right to consider performance in Events outside of those listed in Appendix One.*

29. Appendix Two of the Selection Policy Part B as it relates to the World Championships states:

Purpose: *To qualify Team/athletes to the 2024 Paris Olympic Games*

Performance Targets:

Primary Target: *Qualification of a Team for 2024 Paris Olympic Games*

Secondary Target: *Qualification of individual All-Around position and/or individual apparatus position*

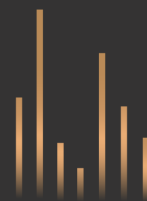
30. The nominated Events as defined and listed in Appendix One of the Selection Policy Part B for the Championships are:

- a. *Challenger Cup Series 2 (24 Sept - 9 Oct 2022)*
- b. *World Championships 2022 (29 Oct – 6 Nov)*
- c. *VSA #3 (28 Nov – 2 Dec)*
- d. *Houston Invitational (4 - 22 Jan 2023)*
- e. *World Cup Series (223 Feb – 18 Mar)*
- f. *VSA #1 (13 – 17 Mar)*
- g. *DTB Pokal (17 – 19 Mar)*
- h. *Continental Championships (6 May)*
- i. *Australian Championships (8 – 14 May)*
- j. *Challenger Cup Series 1 (25 May – 11 June)*
- k. *VSA #2 (19 – 23 June)*

31. Clause 10 of the Selection Policy Part B relates to the Video Selection Activities (**VSA**) and states:

VSAs are provided as an opportunity for Athletes to submit routines to be assessed by a judging panel to contribute to results data for Event(s) selection.

32. The NST may uphold or dismiss the Selection Appeal (Clause 5.2(h) of the Selection Appeals Policy). If upheld, the NST must refer any subsequent decision regarding the Applicant's non-selection or if



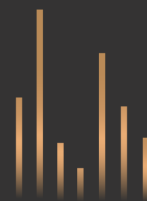
required, any broader decision regarding selection of the Team for the Event back to GA for reconsideration and redetermination. The only exceptions to this are specified in Clause 5.2(k) namely that it is impractical due to time constraints or if GA exhibited disregard for proper application of the Selection Policies.

MAIN SUBMISSIONS AND MERITS

33. In essence, in support of the two grounds of appeal outlined in paragraph 26, the Applicant made three arguments, some of which are related and applied to both grounds of appeal:
- Failure to apply performance targets under clause 9.2.1;
 - Failure to weight performances at past Events under clause 9.2.2, including ranking system, use of average scores and recency of events and level of competition;
 - Not being afforded a reasonable opportunity to meet selection criteria given late notice of use of averages, use of Day 2 Australian Championships and VSA#2 and non-selection as IAA athlete for the Oceania Championships.

Failure to apply performance targets

34. The Applicant contends that the stated Primary Target of the Championships was to select a Team for the Paris 2024 Olympic Games. It was not until 16 May 2023 (after the Australian Championships) that GA advised in writing that the Selection Panel determined the best approach to meet the purpose of the World Championships (ie to qualify Team/Athletes to Paris 2024) was not to seek to qualify a Team, but to achieve up to three quota places via Individual Athlete Performances. This meant:
- The advice was given too late as the Applicant and his coach had been preparing on the basis of Team selection since late 2022;
 - IAA athletes have a better chance of selection if the objective was Team selection; and
 - The Selection Policy Part B was never amended to reflect this change.
35. GA responds that:
- The purpose of having Primary and Secondary Targets is to ensure Australia can maximise the potential to secure Paris 2024 quota spots;
 - GA published a decision tree (provided as Olympic Qualification Map Appendix 5) in October 2022 that clearly shows the decisions to be made on team vs individual qualification based on the performance of Australia at certain events starting from the World Championships 2022. This was discussed at multiple camp orientations and meetings;
 - After extensive consideration of data available, the Selection Panel determined that achieving the Primary Target with any combination of available athletes was not possible;
 - The Selection Policy does not need to be amended as the Selection Panel continually review Australia's position as additional performance data becomes available; and
 - It is not certain that a Team-based selection would include more IAA athletes.
36. The overall stated purpose of the World Championships in the Selection Policy reflects the desire to qualify a Team or Athletes to Paris 2024. In October 2022, all athletes and coaches were provided with the Olympic Qualification Map with discussion around rationale and trigger points. It was known by all



parties on 6 November 2022 that Australia did not finish in the top 18 at the World Championships 2022 and this triggered a review into prioritising individual opportunities. Whilst there are different opinions, the decision was made by a Selection Panel comprised of independent experts after extensive consideration of available data.

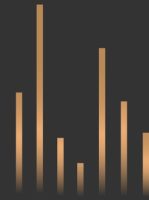
37. Accordingly, all athletes (including the Applicant) had sufficient time to make any necessary adjustments to selection strategy and to training and competition planning and priorities.
38. The Tribunal rejects this ground of appeal.

Failure to weight performances at Events

39. The Selection Panel determined that it would take at least a score of 80 points for an IAA athlete to qualify a quota position. No gymnast within the squad, including the Applicant, had achieved this score within the selection period. Four athletes achieved notable results placing them in apparatus final potential (Bull, Morgans, Sawant, Hardy). The selectors considered the three IAA athletes and determined a ranking of these athletes based on collated data.
40. GA prepared a document entitled 2023 WC Results IAA Comparison (listed as Appendix 4), which compared the three IAA athletes, namely Clay Stephens, James Hardy and the Applicant, Heath Thorpe. That comparison summary included a number of results within the selection period:
 - a. Best stand alone IAA result (Thorpe 2nd)
 - b. Average of the last 3 IAA results (Thorpe 3rd)
 - c. Best potential result (Thorpe 1st)
 - d. Best potential result based only on IAA events (Thorpe 2nd),

and the addition of the totals from these four results led to Clay Stephens having the greatest total amongst the three IAA athletes (ie ranked 1st) and the Applicant ranked 3rd.

41. In addition, the results comparison included results for each of the six individual apparatus for all athletes (and not just IAA athletes) within the selection period and across:
 - a. Best stand alone [apparatus] result
 - b. Average of the last 3 [apparatus] results
 - c. Average of all [apparatus] results
 - d. Average of best 3 [apparatus] results.
42. From these individual apparatus results, Thorpe ranked 2nd for Floor (behind Stephens by only .08), 3rd for Pommel (ahead of Stephens but well behind Sawant as specialist), 1st for Rings, 2nd for Vault, 4th for Parallel Bars (behind Stephens), and 2nd for Horizontal Bars (ahead of Stephens).
43. The Applicant contends that the use of average scores of performances from the last 3 IAA results without proper weighting disadvantages the Applicant because:
 - a. His three events were World Championships 2022 (Oct/Nov 2022), DTB Pokal (March) and Australian Championships (May), which were not as recent as the events used for the other two IAA athletes (namely Oceania Championships and Day 1 and Day 2 of the Australian Championships all of which were in May);



- b. Average scores are not comparable because they are derived from different events with differing levels of competition, recency and judging panels;
- c. World Championships are more strictly judged than other competitions, thus resulting in lower scores;
- d. Results from Oceania Championships were not used when he completed 5 of the 6 apparatus (and an average could have been applied to compare against the other two IAA athletes); and
- e. At the DTB Pokal, the Applicant was not aiming to be peaking.

44. GA responds that:

- a. Use of average scores was not the only metric used;
- b. The Australian Championships (Day 1) was the only event where all three AA athletes competed against each other and is not a conclusive decision when considering all the data;
- c. The Applicant could have taken the opportunity to complete an IAA performance on Day 2 of the Australian Championships and used VSA#2;
- d. All international and domestic events the Applicant competed in were judged by FIG judges and there is no basis to claim one event is judged with stricter application to the rules to another.

45. When considering the performance at Events, the Selection Panel is required by Clause 9.2.2 of Selection Policy Part B to weight the Events, noting at its own discretion and considering several factors including recency of Events and level of competition. This makes sense given there are 11 listed Events with various purposes and targets. For example, the Applicant's argument in relation to DTB Pokal is persuasive given its stated purpose is to provide individual "development opportunities" to categorised athletes in line with their ILPP.

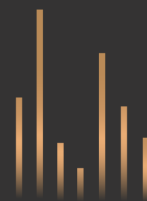
46. No submissions were provided by GA that explained how Events were weighted, despite the detailed submissions of the Applicant in this regard. Based on the 2023 WC Results IAA Comparison and the 29 June 2023 reasons for decision, it is apparent that the Selection Panel did not apply any weighting to the Events.

47. The Tribunal partially upholds this ground of appeal with respect to the GA Selection Panel not properly applying the Selection Policy Part B as it relates to the weighting of Events to determine performance at Events under Clause 9.2.2.

Not afforded reasonable opportunity to satisfy selection criteria

48. The Applicant contends he was not afforded a reasonable opportunity by GA to satisfy the Selection Policy Part B because he was only made aware on 9 June 2023, near the end of the selection period, that selection would be determined based on a ranking that takes into account averages. This meant:

- a. He was disadvantaged as he was not selected as an IAA athlete for the Oceania Championships (although he did compete in 5 of the 6 apparatus) and Oceania Championships are marked more leniently and hence scores will be higher;
- b. He was not aware that Day 2 All-Around scores of the Australian Championships would apply to the averages (he competed in 4 to achieve best possible team performance for NSW);
- c. He would have reconsidered his approach to competing in the DTB Pokal event.



49. GA responds that:

- a. The Applicant was afforded the same number of domestic opportunities as all other athletes and was selected in five from a possible 11 international events within the selection period, noting this is the highest number of international events any of the AA World Championships squad participated in;
- b. The Applicant was selected as one of the five members to the Oceania Championships team, but not as an IAA athlete as the rules restricted a maximum of four athletes on each apparatus. At the time of selection, GA considered the Applicant to have the weakest Parallel Bars routine;
- c. The Selection Policy states that results will be used from Australian Championships (8 – 14 May), which is inclusive of both days of competition.

50. The Tribunal finds that the Applicant was in the same position as all athletes in regards to communication from the Selection Panel (including the 16 May and 9 June 2023 correspondence) and he had the same opportunities to satisfy selection criteria as other athletes.

51. The Tribunal rejects this ground of appeal.

THE TRIBUNAL THEREFORE DETERMINES:

52. The Tribunal acknowledges that GA was proactive and fair in the communication of various strategies and decisions leading into the World Championships. The selection decisions were difficult and complex, particularly accounting for IAA athletes across the six different apparatus and the 11 possible selection events, impact of performances by individual apparatus specialists, against the overall objectives relating to maximising Australian MAG team presence at the 2024 Paris Olympics.

53. The Tribunal partially upholds the Applicant's appeal as it finds the Selection Panel did not weight the Events when determining performance at those Events as required by Clause 9.2.2 of the Selection Policy Part B.

54. The Tribunal refers the matter back to GA with the instruction to reconsider the Applicant's non-selection based on performance at Events listed in Appendix One of the Selection Policy Part B by weighting these Events at the discretion of the Selection Panel. In the weighting of Events, the Selection Panel will consider several factors including but not limited to, recency of Events and level of competition.

55. The Selection Panel should meet as soon as practicable noting the request for a decision on the MAG team for the World Championships by 16 July 2023.

56. The rest of the Appeal is dismissed.

Date: 12 July 2023



Eugénie Buckley